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PATENT APPLICATION *AF*
ATTORNEY DOCKET NO. 200308253-1



IN THE
UNITED STATES PATENT AND TRADEMARK OFFICE

Inventor(s): Stephen Carney

Confirmation No.: 8794

Application No.: 09/712,101

Examiner: Quang N. Nguyen

Filing Date: 11-14-2000

Group Art Unit: 2141

Title: Dynamic Load Balancing of Video Requests

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Commissioner for Patents
PO Box 1450
Alexandria, VA 22313-1450

TRANSMITTAL OF REPLY BRIEF

Sir:

Transmitted herewith is the Reply Brief with respect to the Examiner's Answer mailed on May 16, 2005. This Reply Brief is being filed pursuant to 37 CFR 1.193(b) within two months of the date of the Examiner's Answer.

(Note: Extensions of time are not allowed under 37 CFR 1.136(a))

(Note: Failure to file a Reply Brief will result in dismissal of the Appeal as to the claims made subject to an expressly stated new grounds of rejection.)

No fee is required for filing of this Reply Brief.

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Respectfully submitted,

Stephen Carney

By *Dan C. Hu*

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Stephen Carney § Group Art Unit: 2141
Serial No.: 09/712,101 §
Filed: November 14, 2000 § Examiner: Quang N. Nguyen
For: Dynamic Load Balancing of Video § Atty. Dkt. No.: 200308253-1
Requests § (HPC.0052US)

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Commissioner for Patents
P.O. Box 1450
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REPLY BRIEF PURSUANT TO 37 C.F.R § 41.41

Sir:

This is a Reply Brief responsive to the Examiner's Answer dated May 16, 2005.

**I. REPLY TO THE EXAMINER'S COMMENTS ON GROUPING OF CLAIMS
(Paragraph (7) of the Examiner's Answer)**

The Examiner stated that the rejection of claims 2, 4-12, and 21-33 stand or fall together because the Appeal Brief did not include a statement that grouping of claims do not stand or fall together. Examiner's Answer at 3. The Examiner cited 37 C.F.R. § 1.192(c)(7) to support this contention.

It is noted that the old appeal rules, 37 C.F.R. § 1.192, are no longer applicable. The new appeal rules, 41 C.F.R. 41.37 (effective September 13, 2004), have removed the grouping of claims requirement set forth in former Rule 192(c)(7). See Federal Register, Vol. 69, No. 155, at

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49962, third column (attached). New rule § 41.37(c)(1)(vii) specifies that “[f]or each ground of rejection applying to two or more claims, the claims may be argued separately or as a group.”

Rule § 41.37(c)(1)(vii) further states:

Any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number.

There is no requirement under § 41.37 that a statement be provided that one or more claims stand or fall together. The arguments presented in the Appeal Brief are consistent with the requirements of § 41.37(c).

II. REPLY TO EXAMINER’S RESPONSE TO APPELLANT’S ARGUMENTS

1. Rejection of Claims 2, 4-7, and 9-12 Under 35 U.S.C. § 103 Over Chen In View of Guenther.

In response to Appellant’s arguments that a *prima facie* case of obviousness has not been established with respect to independent claim 4 over Chen and Guentner, the Examiner basically repeated assertions made in the final rejection. Specifically, the Examiner stated that the motivation for combining Chen and Guentner is that “such methods [methods of Guentner] were conventionally employed in the art to allow the system to select the ‘best provider’ (*select the most appropriate server*) and redirect or forward the request to that server as **operating in ‘handoff’ mode**, based on the object of the request, to provide enhanced availability, responsiveness and load balancing for client requests to object access across multiple servers (Guentner, C4: L5-10 and C8:L20-25).” Examiner’s Answer at 9-10 (emphasis in original).

The quoted rationale provided by the Examiner does *not* provide the suggestion or motivation to modify Chen based on the teachings of Guentner. As discussed in the Appeal Brief, Chen describes a system in which a client selects a media server from a list provided by a metasever (*not* a media server) to the client. Thus, Chen already provides a mechanism to

“eliminate the bottleneck problem associated with the limited speed of a single multimedia server, reduce the network congestion and increase the fault tolerance of the whole system.” Chen, Abstract. There was clearly no need to modify Chen to incorporate Guenther’s Fig. 4B mechanism, because to do so would have changed the principle of operation of the Chen system and would have also rendered the Chen system unsatisfactory for its intended purpose of enabling the client to select a multimedia server from a list of multimedia servers provided by a metaserver. Modifying the Chen system with the Guenther Figure 4B arrangement would cause the metaserver of Chen to send the list of multimedia servers to one of the multimedia servers instead of the client, which would effectively *prevent* the client of Chen from selecting a multimedia server from the list. The proposed modification of Chen based on the teachings of Guenther, as proposed by the Examiner, would change the operation such that instead of sending the list from the metaserver to the client, the list would be sent by the metaserver to the multimedia server of Chen. There is absolutely no reason for the metaserver to send its list of potential multimedia servers to any one of the multimedia servers, as such a list would be completely useless to any multimedia server. The operation of Chen depends on the fact that this list of potential multimedia servers is communicated to a client to allow the client to make the selection. In other words, according to Chen, there simply is no reason to involve a multimedia server in the selection of a multimedia server. A person of ordinary skill in the art looking to the teachings of Chen and Guenther would not have been motivated to change the operation of Chen to incorporate un-related teachings of Guenther. In fact, modifying the technique employed in Chen to cause a listing of multimedia servers to be sent to any of the multimedia servers would make the multimedia server selection process more inefficient. *See In re Fine*, 837 F.2d 1071, 1074-75, 5 U.S.P.Q.2d 1596 (Fed. Cir. 1988) (reversing an obviousness rejection

because the teachings of one of the references was inconsistent with the claimed invention); *In Re Gordon*, 733 F.2d 900, 902, 221 U.S.P.Q. 1125 (Fed. Cir. 1984) (reversing an obviousness rejection where the modification of a prior art reference proposed by the Examiner would render the prior art apparatus inoperable for its intended purpose).

In view of the foregoing reasons as well as reasons provided in the Appeal Brief, Appellant respectfully requests the reversal of the final rejection of the above claims.

2. Rejection of Claims 21-33 Under 35 U.S.C. § 103 Over Chen In View of Guenthner.

With respect to independent claims 21 and 28, the Examiner responded to Appellant's arguments by referring to the Examiner's comments regarding claim 4. Appellant respectfully submits that a *prima facie* case of obviousness has not been established with respect to claims 21 and 28 (and their dependent claims) for the reasons set forth above and in the Appeal Brief.

Therefore, it is respectfully requested that the final rejection of the above claims be reversed.

3. Rejection of Claim 8 Under 35 U.S.C. § 103 Over Chen In View of Guenthner.

With respect to dependent claim 8, Appellant noted that Chen and Guenthner do not teach a master streaming media server that includes a load poll thread, a load average queue, and load average threads to determine the load balancing among the plurality of streaming media servers.

The Examiner cited Chen, column 7, lines 1-38, as teaching this feature of claim 8. Specifically, the Examiner referred to tasks performed by a metaserver, including balancing load across available multimedia servers by determining if multimedia servers are busy and how close

a multimedia server is to a client. Examiner's Answer at 11. The Examiner also noted the teaching in Chen that the metaserver periodically communicates with each multimedia server to receive status information such as number of current connections and multimedia content. *Id.* From this, the Examiner derived that Chen must teach the elements of claim 8.

This assertion is clearly incorrect. It is unclear how "number of current connections" and "multimedia content" leads to the conclusion that a load poll thread, a load average queue, and load average threads are taught. Chen also refers to using a time zone, subnet addresses, and region names to determine how close a client is to a multimedia server. This teaching also has nothing to do with a load poll thread, a load average queue, and load average threads.


This is an additional reason that a *prima facie* case of obviousness has not been established with respect to claim 8. Reversal of the final rejection of claim 8 is respectfully requested.

III. CONCLUSION

In view of the foregoing and arguments provided in the Appeal Brief, reversal of all final rejections and allowance of all pending claims is respectfully requested.

Respectfully submitted,

Date: July 14, 2005



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application for a patent, an application for reissue of a patent, or an *ex parte* reexamination proceeding to the Board.

Section 41.30 sets forth definitions for Board proceedings under subpart B of part 41. The preamble to § 41.30 is based on a similar provision in the preamble of former Rule 601. The term "proceeding" sets forth a generic term for a national application for a patent, an application for reissue of a patent, and an *ex parte* reexamination proceeding. The term "applicant" sets forth a generic term for either the applicant in a national application for a patent or the applicant in an application for reissue of a patent. The term "owner" sets forth a shorthand reference to the owner of the patent undergoing *ex parte* reexamination under Rule 510.

Section 41.31 is added to generally incorporate the requirements of former Rule 191(a)–(d). Paragraph (a) is subdivided into three parts to improve readability. Paragraph (d) is amended to refer only to the time periods referred to in paragraphs (a)(1)–(a)(3) of this section, while the current extension of time requirements for Rules 192, 193, 194, 196 and 197, formerly provided in Rule 191(e), is relocated to §§ 41.37, 41.41, 41.47, 41.50 and 41.52.

Section 41.33 is added to replace the requirements of former Rules 116 and 195. Paragraph (a) provides that amendments filed after the date of filing an appeal pursuant to § 41.31(a)(1)–(a)(3) and prior to the date a brief is filed pursuant to § 41.37 may be admitted as provided in § 1.116. Thus, amendments after final but prior to appeal and amendments filed after appeal but prior to the date the brief is filed will be treated under the same standard (i.e., § 1.116). Paragraph (b) provides that amendments filed on or after the date of filing a brief pursuant to § 41.37 may be admitted: (1) to cancel claims, where such cancellation does not affect the scope of any other pending claim in the proceeding, or (2) to rewrite dependent claims into independent form. A dependent claim is rewritten into independent form by including all of the limitations of the base claim and any intervening claims. Thus, no limitation of a dependent claim can be excluded in rewriting that claim into independent form. Paragraph (c) provides that all other amendments filed after the date of filing an appeal pursuant to § 41.31(a)(1)–(a)(3) will not be admitted except as permitted by §§ 41.39(b)(1), 41.50(a)(2)(i), 41.50(b)(1) and 41.50(c). Paragraph (d)(1) provides that affidavits or other evidence filed after the date of filing an appeal pursuant to § 41.31(a)(1)–(a)(3) and prior to the date

of filing a brief pursuant to § 41.37 may be admitted if the examiner determines that the affidavits or other evidence overcomes all rejections under appeal and that there is a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. Paragraph (d)(2) provides that all other affidavits or other evidence filed after the date of filing an appeal pursuant to § 41.31(a)(1)–(a)(3) will not be admitted except as permitted by §§ 41.39(b)(1), 41.50(a)(2)(i) and 41.50(b)(1). Paragraph (d) replaces the former practice of permitting such evidence based on a showing of good and sufficient reasons why such evidence was not earlier presented set forth in former Rule 195. The Office believes that prosecution should occur before the examiner prior to an appeal being filed, not after the case has been appealed pursuant to § 41.31(a)(1)–(a)(3).

Section 41.35 is added to generally incorporate the requirements of former Rule 191(e). In addition, this section makes clear that jurisdiction over an application may be relinquished by the Board and the application returned to the examining operation to permit processing to be completed by the examining operation before the Board takes up the appeal for decision. This is consistent with the present practice of returning an appealed application to the examining operation where some matter requiring attention has been identified prior to assignment of the appeal number and docketing of the appeal. In addition, the Board is permitted to take other appropriate action to complete the file.

Section 41.37 is added to generally incorporate the requirements of former Rule 192. In addition, the following changes have been made:

(1) The title of the section has been changed from "Appellant's brief" to "Appeal brief".

(2) In paragraph (a), one copy of the brief is required rather than three copies consistent with the Office's move to an electronic file wrapper.

(3) In paragraph (a), the brief is required to be filed within two months from the date of the notice of appeal under § 41.31 even if the time allowed for reply to the action from which the appeal was taken is later, which overall simplifies docketing of the due date.

(4) In paragraph (c)(1)(i), a statement is required in the brief identifying by name the real party in interest even if the party named in the caption of the brief is the real party in interest. This provides appellant the necessary mechanism for complying with § 41.8(a) in an appeal to the Board.

(5) In paragraph (c)(1)(ii), identification is required of all other prior and pending appeals, interferences or judicial proceedings known to appellant, the appellant's legal representative, or assignee which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal, as well as to set forth a mechanism for complying with § 41.8(b) in an appeal to the Board.

(6) In paragraph (c)(1)(iii), both a statement of the status of all the claims in the proceeding (e.g., rejected, allowed or confirmed, withdrawn, objected to, canceled) and an identification of those claims that are being appealed is required.

(7) In paragraph (c)(1)(v), a concise explanation of the invention is required for each of the independent claims involved in the appeal, which explanation shall refer to the specification by page and line number, and to the drawings, if any, by reference characters. For each independent claim involved in the appeal and for each dependent claim argued separately under the provisions of paragraph (c)(1)(vii) of this section, every means plus function and step plus function as permitted by 35 U.S.C. 112, sixth paragraph, must be identified and the structure, material, or acts described in the specification as corresponding to each claimed function be set forth with reference to the specification by page and line number, and to the drawing, if any, by reference characters. The former requirement of Rule 192(c)(5) to set forth a concise explanation of the invention defined in the claims involved in the appeal by reference to the specification by page and line number, and to the drawings, if any, by reference characters was not being followed in a great number of briefs before the Board.

(8) In paragraph (c)(1)(vi), a concise statement listing each ground of rejection presented for review is required rather than issues for review. An example of a concise statement is "Claims 1 to 10 stand rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. X."

(9) The grouping of claims requirement set forth in former Rule 192(c)(7) is removed. The general purpose served by former Rule 192(c)(7) is addressed in § 41.37(c)(1)(viii). The existing grouping of claims requirement has led to many problems such as (i) Grouping of claims across multiple rejections (e.g., claims 1–9 rejected under 35 U.S.C. 102 over A while claims 10–15 are rejected under 35 U.S.C. 103 over A and the appellant